



Video Recording of Trial Testimony for Closing Argument

By Richard L. Seabolt



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Technology has transformed the manner in which many modern trials are tried. Wireless internet and e-mail access through WiFi and wireless cellular-based card devices can allow legal research in the courtroom and eliminate the need to messenger or ship documents. And, the trial lawyer's dream is also now possible: with computer and video technology it is now possible to impeach a witness by displaying the witness's own video-recorded testimony so the jury can see and hear the witness give earlier, contradictory testimony. The increasing capacity and speed of computers and the

dramatic decrease in price of the hardware and equipment now make the technology feasible in cases in which they were never before practical.

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One of the most frequent uses of technology in litigation today involves the use of video cameras to record deposition testimony. The presentation of video-recorded deposition testimony has been described as “one of the most important innovations offered by modern trial technology.” *See*, Ingle and Bini, *Video: The Changing Face of Depositions*, National Law Journal (November 12, 2002). Depositions, particularly of witnesses who will not be available for trial, are now often video recorded to avoid the traditional, incredibly dry process by which transcribed deposition testimony was read to the jurors. Although trial lawyers have tried to increase juror interest when reading deposition testimony by occasionally hiring actors to sit in the witness stand to portray the unavailable witness in a question-and-answer read-back of the testimony, such readings remain dry and tedious. Fortunately, California discovery statutes now authorize video-recorded depositions and permit the video display of testimony of unavailable witnesses. Code Civ. Proc. § 2025(l) (l). As the California Supreme Court has recognized, video recording “provides a far *better record* of the examination than any transcript or audiotape.” *See*, *Emerson Electric Co. v. Superior Court*, 16 Cal.4th 1101, 1109 (1997) (quoting Weil and Brown, *California Practice Guide — Civil Procedure Before Trial*). Such video-recorded depositions, of course, require that the equipment necessary to display the video-recording be available in the courtroom. Usually that involves a computer that can store the digitized video recording, computer trial presentation software (such as Trial Director or Sanction) to search the written transcript, and a means to display the video — usually large monitors, individual flat screen monitors for small groups of jurors, or a projection system.

But, while it is relatively common today to incur the costs involved with the use of the computers and other equipment necessary

for the playback and display of video-recorded depositions, it is very rare for the lawyers in those same cases to utilize the same equipment in a similarly effective manner — to video record the testimony of witnesses who appear at trial so that excerpts of the live witness’s video-recorded testimony can be displayed to the jury during closing arguments.

This article advocates that trial lawyers consider video-recorded trial testimony whenever it is expected that the courtroom will be outfitted with the computer-video equipment necessary to use and display video-recorded deposition testimony during the trial. Jurors today expect greater use of modern technology to help them understand increasingly complex issues. Because jurors see computer-enhanced graphics and video-recorded “sound bites” on network and cable television every evening, jurors also expect that modern presentation techniques will be used in the courtroom. A goal of technology in the courtroom is to “move information to people.” *See*, Facilities Guidelines for Technology in the Courthouse (Judicial Council of California 2002). Video technology creates the ability to bring the visual and audio components of witness testimony closer to the jurors. The same video-recording techniques commonly used for depositions can be used to bring the key live testimony back to the forefront of the jurors’ memories during the critical closing argument phase of trial.

Principal Advantage – Credible Portrayal of Critical Evidence

The author has been involved in three trials in which trial testimony was video-recorded. The first two cases were tried in 1988 and 1991 in a specially-constructed courtroom designed to accommodate the 30-40 law firms that represented the parties in those cases. Video-recording equipment was designed into the courtroom with a video



camera mounted on the wall above and behind the jury box and directed at the witness stand. The trial testimony of the witnesses was recorded on the then-standard VHS videotape. The video camera had a video cable feed to VCR equipment operated by court personnel, as well as video feed to nearby offices used by various law firms. These cases involved jury trials each of

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which lasted more than three months, with more than 30 trial witnesses. In one of the cases, closing arguments spanned four days. During closing arguments, both sides displayed videotaped excerpts of the testimony of trial witnesses whom the jury had seen testify earlier during the trial. Observers of the trial, including experienced jury consultants retained by both sides, were struck by

the power of being able to display a videotaped excerpt of what the jury had seen earlier during the testimony portion of the trial.

It is an incredibly powerful tool to be able to display a video recording of key witnesses. Skillful editing can focus the jury on the precise testimony on which counsel bases his or her arguments. Counsel then is in a position to introduce the subject of the testimony by reminding the jurors of the particular witness and the key issues addressed by that witness, and follow that description by showing the precise video-recorded testimony that counsel wants to bring together with other evidence to build an integrated and unified closing argument. Jurors are reminded not just of the testimony, but also reminded of the appearance and the demeanor of the witnesses. Such video-recorded trial testimony makes the key evidence more accessible to the jury and allows the jurors to focus on the truly critical issues in a complex trial. It enhances the credibility of counsel giving a closing argument to be able to remind the jury of what the witness said, and then be able to show the jury that the witness said exactly what was described.

Remarkably, although video-recording is used in litigation for other purposes, it is almost never considered for closing arguments. Although the author has been involved in three video-recorded trials, the major vendors that support video-recording of depositions have not encountered other cases in which video-recorded trial testimony has been used for purposes of closing arguments. No similar uses of video-recording equipment appears to be reported in “technology in the courtroom” literature, although trial technology-related literature does refer to other, different uses of video-recording equipment at trial. Those other uses include video-recording as a cost-savings substitute for court reporters, the display of video-recorded deposition testimony, video conferencing to allow testimony by

witnesses in remote locations, and entirely pre-recorded trials. But video-recorded trial testimony for use in closing arguments is a logical extension of the use of video-recorded deposition testimony where others have noted that “by combining imaged documents, graphics, charts, animations, and full motion video recordings in an integrated presentation, counsel can weave together all of the disparate elements in the case...and present a far more persuasive argument than might otherwise be possible.” *See*, Gruber, Nicholson and Reichel, “Video Technology” 58 AmJur Trials 481 (updated June 2004) § 75.

— **Other Advantages** —

Juror absence can be a common problem in lengthy trials. Jurors on occasion become sick or are unable to attend a day or two of trial because of family or work emergencies. Typically, the absence of a juror requires that the trial be recessed or that the juror be excused. However, if all trial witnesses are video-recorded, it becomes possible — with the stipulation of the parties — to permit an absent juror to view the video-recorded testimony that the juror missed. Such a procedure was used in one of the lengthier video-recorded trials in which the author was involved, where the jurors gave favorable reports about the use of the video-recordings to accommodate their absences. Because breaks, side-bar conferences and other interruptions can be removed from video-recordings shown to absent jurors, they were able to observe a full day of trial in much less time than required for the remainder of the jury that attended the trial live.

Reversals and retrials present yet another risk in lengthy, complex trials. Complex trials sometimes involve issues where the law is unsettled. Because the appellate process can be lengthy, there is always a risk that trial witnesses may die or otherwise become unavailable between the first trial and any

retrial. Video recording all trial testimony helps preserve testimony in much the same way that a video-recorded deposition preserves the testimony — and appearance, intonation and demeanor — of an unavailable witness.



— **Absence of Statutory Authority** —

Video-recorded deposition testimony was authorized in the Civil Discovery Act of 1986. Under the statute, a deposition can be video recorded whether or not both parties agree that the deposition should be video recorded. Sometimes a video-recorded deposition occurs because an adverse witness is out of state and counsel believes that it is important that the jury observe the witness’s testimony.



On other occasions, counsel may wish to use a video-recorded deposition of an expert witness or treating physician to accommodate the busy schedule and the expense of the witness. *See* Code Civ. Proc. § 2025(u) (4). In those situations, the opposing counsel might prefer that the deposition not be video recorded. Under the statute, however, either party has the option of compelling a video-recorded deposition over the objection of the opposing side.

Even though video-recorded depositions are an accepted part of modern litigation practice, there is no statutory authority for video recording a trial. Thus, absent agreement, a trial generally cannot be video recorded. Agreement, however, often can be obtained by impressing on the court and opposing counsel that video recording is simply an effective way to help the jury focus on the most critical evidence. A party that refuses to agree to allow video recording at trial often can be persuaded to agree when it is explained that they will be portrayed to the court as a party that does not want the jurors to focus on critical witness testimony. Parties who are deciding whether or not to agree to video record trial testimony also should not assume that there necessarily will be an advantage to the side whose witnesses have given inconsistent or awkward testimony. Sometimes a video recording of such testimony may humanize the witness. *See*, Ingle and Bini, *supra*, *Video: The Changing Face of Depositions*, National Law Journal (November 12, 2002) (describing how the video of President Clinton's deposition testimony regarding Monica Lewinsky caused viewers to "soften their judgment of him, boosting his public appeal").

— Jurors' Reactions —

For decades, trial lawyers and their consultants have been conscious of the effect that glitzy technology could have on jurors. Although there was a time when trial lawyers

worried that the use of computers at their counsel table could have an adverse effect on jurors, those concerns are substantially less — or even non-existent — today. But there remains a concern about the jurors' perception of fairness if the technology appears to provide a substantial advantage to only one side of the case.

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Even lawyers for obviously wealthy corporate defendants are sensitive to potential juror perceptions that they are taking advantage of their wealth when applying expensive technology to the courtroom. In personal injury cases, where injured plaintiffs often face wealthy corporate defendants, the defense lawyers must consider the risk that



too much technology may create a perception in the jury that the defense has an unfair advantage. Similarly, the defense must consider the risk that expensive technology may telegraph to the jury the seriousness with which the defendant views the case. In business-versus-business cases, such considerations can also play a factor. Trial lawyers should be concerned about appearing too technologically superior to their adversaries, but also be concerned about appearing relatively unprepared or inept in their use of technology. For those reasons and cost reasons, there is merit in at least considering an approach to the other side about sharing the cost of the same video-projection equipment. Shared video equipment eliminates any juror perceptions of unfairness and, of course, also reduces the cost. Even when the video-projection equipment is shared, each party will almost certainly wish to use separate computers and separate operators to protect the work product inherent in deciding what video-recorded segments each side may wish to display.

— Media and Public Trials —

Some trials are video-recorded for entirely different reasons. High profile cases that have drawn media interest are sometimes televised on CourtTV or other television programs. The televising of court proceedings for public display raises many more controversial issues — particularly after some of the sharp criticism that occurred following the live television coverage of the O.J. Simpson criminal trial. Because trials are public *NBC Subsidiary (KNBC-TV, Inc.) v. Superior Court*, 20 Cal. 4th 1178 (1999), video recordings used for purposes of closing arguments invariably could become accessible to the media and the public. However, most of the objections to the live broadcasting of trials are removed if the video-recorded testimony is not accessible until after the verdict has been returned by the jury. While another

objection to televised trials relates to the concern that the presence of a television camera will alter the demeanor of the witnesses and lawyers, the basis for that objection is largely removed, if instead of a constantly present television camera crew, a simple, stationary wall-mounted camera records from a position above and behind the jury box.

— Court Reporters and the Future —

As a cost-savings measure, the Judicial Council promulgated rules in 1994 that authorized the electronic recording of Superior Court proceedings in place of a transcript prepared by a court reporter. In *California Court Reporters Association, Inc. v. Judicial Council of California*, 39 Cal. App. 4th 15 (1995), the California Court Reporters Association challenged the Judicial Council's rules and prevailed on the ground that the California Legislature had by statute required that trial proceedings be recorded and preserved with shorthand notes. The Court of Appeal held that the involved California Rules of Court were invalid because Code of Civil Procedure section 269 provides that "the official record of superior court proceedings be taken down in shorthand." *Id.* at 18. Absent a statutory change, video recording of trial testimony can only supplement a court reporter's transcript.

Indeed, in other states that have experimented with electronic recording of trial court proceedings, many have reached the conclusion that an electronic recording is unsuitable for the appellate process. Appellate briefs need to quote from and cite to written transcripts. Moreover, appellate judges are accustomed to reviewing written transcripts, and many would find any review of video-recorded testimony to be difficult and inefficient.

Voice recognition software, however, has advanced significantly in the past few years.



When voice recognition software advances to the point that the spoken word can be accurately translated and recorded into a written transcript, it is inevitable that there will be cost-saving inroads in the method by which trial proceedings are recorded.

— **Practicalities and Costs** —

If video-recorded depositions will be displayed at trial, the parties already will need a courtroom computer that has trial presentation software, such a Trial Director or Sanction. The courtroom also will need to have a

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video display system — either a projection system, monitors or smaller flat screen displays near the jurors. If the equipment will be present throughout trial, which is relatively common, the additional marginal costs

associated with video recording trial witnesses will be limited to the rental or purchase of a video camera and a tripod, and the cost of synchronizing the video recording with the court reporter’s transcript. In this way trial presentation software can be used to perform word searches to locate the desired portions of the video. To minimize cost, it is not necessary that the camera be capable of “broadcast quality.” Consumer-quality digital video cameras provide more than sufficient detail for the jury to observe the appearance and demeanor of the witnesses. Although the synchronization of the video with the written transcript until recently has been done manually at some moderate expense, techniques are now available to automate that process, and thus reduce the costs. If a skilled legal assistant can operate the trial presentation software, it may not be necessary to hire the services of an outside trial technology firm to create the video clips used during closing argument. Overall, the cost per day of trial should be approximately equivalent to the cost per day of a video-recorded deposition, which, if the deposition video recordings are to be used at trial, necessarily includes the additional cost of synchronizing the video-recorded testimony with the court reporter’s transcript.

Not all technologies are appropriate for all trials, but in the author’s view all trial lawyers should at least be aware of the powerful video techniques that are among the arsenal of technological tools available to them. Video-recording allows trial lawyers to use trial testimony in closing arguments in a manner that is far more effective than merely quoting or displaying the written word. It allows trial lawyers to focus the jury on the most critical trial testimony, increasing the likelihood that the jurors will make an informed, reasoned decision. For those cases that cannot be settled and must be tried, it is worth at least considering this frequently overlooked, but extremely effective option.